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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 746

DONALD LESTER JAMES, IVAN ORRELS, DEWEY D'ANGELO, ALICE DIANNE WHITMIRE, and JACK EDWARD KRESS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Donald Lester James, Ivan Orrels, Dewey D'Angelo, Alice Diane Whitmire, and Jack Edward Kress, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed a judgment of conviction of the United States District Court for the Southern District of Mississippi.

OPINIONS BELOW

The District Court rendered no opinion. Judgments of conviction were filed herein on May 13 and June 24, 1968. (Appendix A). The Court of Appeals filed an opinion on September 17, 1969 (Appendix B) and its judgment of affirmance was entered on the same day (Appendix C).

JURISDICTION

The judgment of the Court below was entered on September 17, 1969 (Appendix C). The jurisdiction of this Court is conferred by 28 USC 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment and convictions are valid where the jury array from which the petit and grand jury were selected in 1967 was intentionally composed of 52% women and 33 1/3% Negroes.

2. Whether listing the generic class of items to be seized in search warrants satisfies the Fourth Amendment and whether the affidavits filed herein were sufficient to establish probable cause for such search warrants. Was evidence seized illegally from petitioner, Kress, and should his motion to suppress have been granted?

3. Whether *Kotteakos v. United States,* 328 U.S. 750 (1946) has been "severely limited" by *Blumenthal v. United States,* 332 U.S. 539 (1947) as has been determined by the Court below or whether convictions can be sustained where the overwhelming weight of the evidence by prosecution and defense witnesses alike establish multiple conspiracies which have been alleged in a single court and which furnish the basis for the joinder of counts herein. Whether the issue of multiple conspiracies should have been submitted to the jury. Was there misjoinder of parties and causes of action?

4. Whether in a joint trial of seven defendants where each had made incriminating post conspiracy statements and admissions and where some admissions implicated other de-

fendants and where the District Court admitted into evidence twenty statements limited solely against a single defendant, severance was required to secure a fair trial. Was severance in order under *Bruton v. United States*, 391 U.S. 123 (1968)?

5. Whether a showing of particularized need is necessary under *Dennis v. United States*, 384 U.S. 855 (1966) before grand jury testimony of two key prosecution witnesses will be made available for use on cross-examination.

6. Whether the District Court erred in refusing to dismiss the indictment and/or grant a new trial by reason of the unjustified instructions by the government to a key prosecution witness to falsify when interviewed by defense counsel. Did this improper suppression of evidence deny petitioners due process?

7. Whether there was improper and prejudicial publicity released by the government herein and improper influence exercised upon the grand jury. Whether the overall conduct of the government denied petitioners a fair trial.

8. Whether the District Court's charge to the jury construed as a whole was confusing and erroneous. Whether the charge instructed the jury properly on reasonable doubt, on aiding and abetting, on conspiracy, on gambling under Mississippi law, and on criminal intent.

STATEMENT OF THE CASE

A. The Indictment

Count One of the indictment (R.1)* charges the defendants with conspiracy to violate 18 U.S.C. 1952 by means of an agreement to transport in a U-Haul Trailer electro-magnets (known as juice joints) from Tulsa, Oklahoma, to Biloxi, Mississippi, to be used at the Red Carpet Club and Deano's Lounge to control dice games conducted in violation of the gambling laws of Mississippi. The alleged con-

*R. References are to the Appendix filed in the Court of Appeals.

spiracy also included the interstate use of the mails to cash gambling checks. Defendants, except Orrells, were found guilty of violating this Count.

Count Two charges five defendants (Alice Dianne Whitmire and Harvey Hutchins were not included) with violation of 18 U.S.C. 1952 by the use of U-Haul Trailer facilities in interstate commerce to transport electro-magnets from Tulsa, Oklahoma, to Biloxi, Mississippi, to be used at the Red Carpet Club and Deano's Lounge in Biloxi to control dice games conducted in violation of the gambling laws of Mississippi. Rolling was found not guilty of this charge. Jack Kress, Dewey D'Angelo, Donald Lester James and Ivan Orrels, were found guilty on this Count.

Count Three charges violation of 18 U.S.C. 1952 by the use of interstate commerce to cash gambling checks of John B. Turner II, drawn on a Cedar Rapids, Iowa, bank and deposited in the Gulf National Bank at Gulfport, Mississippi. Only Harvey Hutchins was found guilty of this charge.

Count Four charges violation of 18 U.S.C. 1952 by the use of interstate commerce to cash gambling checks of J. Harold Holt, drawn on a Memphis, Tennessee, bank and deposited in the Gulf National Bank at Gulfport, Mississippi. Only petitioners, Alice Dianne Whitmire and Dewey D'Angelo were found guilty of this charge.

B. Summary of the Evidence

The Government's witnesses produced at the trial consisted of 11 Federal Bureau of Investigation agents, 4 state officials and 31 additional witnesses, together with some 43 exhibits.

Agents of the Federal Bureau of Investigation and others testified over objections and after severance motions had been denied (R. 21, 29-30, 732) to admissions made by each defendant. Petitioner Dewey D'Angelo admitted to an agent the possession and use of the electro-magnets (juice joint) in Deano's Lounge where it had been transferred in August 1965, from the Red Carpet Club which had been

padlocked in June, 1965. His confession implicated Jack Kress, whom he claimed personally loaned him approximately $5,000.00 in October, 1965. He admitted directing Alice Dianne Whitmire to open a checking account in October, 1965, in the name of A.D. Marks which was used to deposit checks cashed at Deano's Lounge (R. 440-472). According to a witness, D'Angelo threatened to get anyone who testified against him (R. 1650-1, 1671). Other evidence, through the hearsay testimony of Robert Bennett, tended to establish that D'Angelo conspired with Harry Bennett, Donald Lester James and Jack Kress to bring a juice joint to Mississippi from Tulsa. Agents of the Federal Bureau of Investigation and others testified to the removal of the juice joint from Deano's Lounge on November 23, 1965 (R. 474-6, 1838-9, 1851).

Petitioner, Donald Lester James, told an agent that he made a trip to Tulsa in March, 1965, and that "if he told what he had in a trailer on his return that he would involve himself in a federal violation" (R. 134). Other evidence established that James, with Orrels, was in Tulsa in March, 1965, with James' white Cadillac, that he rented a covered U-Haul Trailer (R. 1005-1016) which was seen at Pass Christian Bridge in Mississippi on March 17, 1965 (R. 1005-8), later that night at Benny French's Lounge in Mississippi (R. 1021), and two days later at the Red Carpet Club. James rented equipment to cut cement floors and helped install the electro-magnets at the Red Carpet Club. He advised witness Faye Chase that she should state she knew nothing about the case (R. 1645-50).

Petitioner, Ivan Orrels, went with James to Tulsa and returned with him. He had nothing to do with the installation of the juice joint at the Red Carpet Club or with the Red Carpet Club or Deano's Lounge. He departed after the trailer was parked overnight at Benny French's. Orrells told an agent that he went to Tulsa with another man and returned with a U-Haul Trailer. He said he would be a fool to admit something which could be a violation of federal

law (R. 108-112). Orrels was acquitted on the conspiracy count and found guilty only on Count Two.

Rolling told an agent he had never witnessed gambling of such a crooked nature as existed in Biloxi (R. 502). Rolling worked at the Red Carpet Club and thereafter at the dice table at Deano's Lounge. He helped install the juice joint at Deano's (R. 1808-9), but was not identified as having any connection with the transportation of the juice joint from Tulsa to Biloxi or its installation at the Red Carpet. Rolling was convicted only on the conspiracy count.

Jack Kress admitted to an agent that he manufactured magnetic and other types of dice, that he made visits to Biloxi and that he knew James. Eight Federal Bureau of Investigation agents testified to the contents of the manufacturing plant of Jack Kress, seized by them pursuant to warrants on July 21, 1966 (R. 525-726). The seizure was the subject of an unsuccessful motion to suppress. The agents described Kress' plant as one which manufactured magnetic and other types of dice and they identified exhibits showing shipments of packages to Biloxi. Kress had purchased four square wire from which the electro-magnets involved had been made. He had a magnetic charger and other electrical equipment and machinery as well as a table which contained an electromagnet (of a different type) implanted in the table itself. Other evidence was introduced by the agents and others to show that Kress destroyed or removed some of his records (Tr. 1386-93)** and that he attempted to have a witness do the same (R. 417-20). Other witnesses identified Kress as the person who came to Biloxi to repair the juice joint (R. 1417-8, 1807-1810) and as the shipper of packages (R. 1417-8). He was present at the completion of the installation of the juice joint at the Red Carpet (R. 1388). No evidence was produced to show where the juice joint was manufactured or that it was ever at Kress' plant in Tulsa, or that it was in fact loaded on the trailer in Tulsa or transported from there.

**Tr. References are to the trial transcript.

Only defendants Harvey Hutchins and Alice Dianne Whitmire took the witness stand. They admitted on the stand, as they had prior to trial, that they obtained out of state checks which were exchanged for cash at the Red Carpet Club (Hutchins, Tr. 1672-3) and at Deano's Lounge (Whitmire, Tr. 1776-7). When the checks were cashed, the makers were not required to gamble (R. 1143). Neither had any idea that they might be charged with a federal violation for depositing checks in the Check Cashing Service account (Hutchins, Tr. 1658) or in the account of A.D. Marks (Whitmire, R. 1242-46), at the Gulf National Bank for collection. Hutchins and Whitmire each received a commission for their services (Tr. 1641, 1778). Neither knew, intended to use or authorized the use of the mails in connection with the deposits of checks in their accounts (Tr. 1700-2, 1779). Hutchins, an attorney, had searched the law (18 U.S.C. 1952) and its history and concluded that his Check Cashing Service was legal (Tr. 1684-6).

Robert Bennett, Maurice Arnold and Jean Proctor were named as co-conspirators herein but not indicted. All testified as prosecution witnesses.

Robert Bennett testified (R. 1053-1215) that he was an attorney, convicted of receiving stolen property and on probation (R. 1206-7), that his deceased father was a professional gambler who opened the Red Carpet Club in November or December, 1964 (R. 1057), and that it was closed by injunction on June 16, 1965 (Tr. 1090). He stated that Dewey D'Angelo suggested to his father that a juice joint be secured from Kress of Tulsa (R. 1060-1). His father told him that the juice joint was brought to the Red Carpet by Kress (R. 1078). On March 19, 1965, after the installation of the juice joint at the Red Carpet he saw Kress, James, Rolling, Maurice Arnold and his father there (R. 1076-7). Deano's Lounge was opened around September, 1965, after the closing of the Red Carpet with his father, D'Angelo, Rolling and Gus Noble as partners (R. 1098-9). The juice joint was installed there by D'Angelo, Rolling, Arnold, Paul

Brown and others (R. 1101-2). He and Harvey Hutchins conceived the Check Cashing Service which had the Red Carpet as a customer (R. 1091-5). It had no connection with the juice joint transaction (R. 1134). Only he, Hutchins and D'Angelo were concerned with the Check Cashing Service. The other defendants had nothing to do with it (R. 1147-8, 1155-6). Robert Bennett was not involved in gambling at the Red Carpet or Deano's Lounge nor in the interstate transportation of the juice joint (R. 1188-92), and neither he nor Hutchins had anything to do with the A.D. Marks account (R. 1189-90, 1210). He testified before the grand jury without any promises of leniency (R. 1112-4). His hearsay testimony was the basis for repeated objections (R. 1056-60, 1061, 1064, 1067, 1071, 1078, 1088, 1091, 1103, 1105, 1106). His grand jury testimony was requested but production of the same was denied after an in camera inspection by the Court (R. 1118-33, 1459-66, 1598-99).

Maurice Arnold, on probation for interstate theft of an automobile (R. 1490-2), testified that he, James, Rolling and two colored boys unloaded the trailer and installed the juice joint at the Red Carpet in March of 1965 (R. 1374-6). It weighed about 2,000 pounds (R. 1384). Kress assisted at the end of the installation (R. 1388, 1541). The move of the juice joint to Deano's Lounge was performed by Arnold, Paul Brown and Rolling (R. 1424). Dewey D'Angelo was not a participant (R. 1477). He called Kress to fix the controls at Deano's (R. 1420-30). He was advised by Government counsel, Owen Neff, not to discuss what he said before the grand jury, to hide such fact, to misrepresent and say that he had claimed the Fifth Amendment. He so advised defense counsel before trial. (R. 1456-8, 1482-4, 1508). The cashing of checks had no relation to the transportation of the juice joint from Tulsa to Mississippi (R. 1487). Arnold did not participate in any agreement to transport a juice joint to Mississippi (R. 1486-7). His hearsay testimony was the subject of objections (Tr. 1367, 1403), 1588-9). Over objection, he testified that his testimony be-

fore the grand jury was truthful (R. 1455-6). A motion calling for the production of his grand jury testimony was denied after in camera inspection by the Court (R. 1459-60, 1464-65).

Jean Proctor was Harvey Hutchins' secretary. She confirmed that the Check Cashing Service established in March or April, 1965, was unrelated to the juice joint transaction (R. 1303, 1336-9). It was formed to service gambling casinos generally. Harry Bennett used it for the Red Carpet to solve his check bouncing and tax problems (Tr. 1298, 1301). Fees were paid to Robert Bennett and Hutchins for their services (R. 1305).

Ten witnesses who gambled at the Red Carpet Club and Deano's Lounge testified that they received cash for their checks, that they were not obliged to gamble with the cash thus received, and that they lost money at each place (R. 168-263).

Defense witnesses testified that the U-Haul Trailer involved herein, which admittedly had been parked overnight on March 17, 1965, outside Benny French's Lounge in Mississippi (R. 861-7), was empty and was loaded there with a dice table (R. 863-5). Thereafter, the trailer was moved to the Red Carpet. The U-Haul Trailer was not capable of transporting a 2,000 pound juice joint (R. 830-37). At the close of the Government's case and at the close of the entire case, the pretrial motions, including the motion for severance, were renewed. In addition, motions were made for judgment of acquittal (R. 728-39) all of which were denied. The Court denied the motion for acquittal on behalf of Alice Dianne Whitmire, with misgivings (Tr. 1865-7) and observed that the questions presented by the various motions were "pretty tough, they're close, they're hard decisions to make but that's the best I can do." (Tr. 1873).

C. The District Court's Instructions

The District Court charged the jury that it should not hunt for reasonable doubts and that proof beyond a reasonable doubt is established if the evidence is such as the jury

would be willing to rely and act upon in its most important affairs (R. 939, 942). The charge failed to indicate adequately that to establish aiding and abetting a principal had to be found guilty of all the elements of the crime (R. 997). The jury was advised that when men embarked on a conspiracy, much is left to unexpressed understanding (R. 954-5), that operating the dice and other games heard about in the case violated Mississippi law (R. 960-1), that a substantial course of illegal conduct before and after interstate travel or use of mails allowed an inference that the interstate activity was undertaken with intent to carry on a business enterprise involving violation of the Mississippi gambling laws (R. 971). Numerous requests for instructions by petitioners were denied (Tr. 2092-2095).

The jury returned verdicts of guilty as to each defendant and each was sentenced to a separate prison term on each guilty count. Some of the defendants were fined in addition (Tr. 2130-2155, Tr. June 24, 1968, pp. 2-3, R. 33-49). All defendants filed notices of appeal on the dates of their sentences.

D. The Court of Appeals Opinion

The Court of Appeals affirmed the convictions of all defendants. It ruled (1) that no constitutional infirmity was involved in the system used to select the juries herein, (2) that the search warrants directed against Kress were sufficient and no illegality surrounded the search or seizure of his property at his plant, home and automobile, (3) that although "the indictment alleges a single conspiracy in a single count" and although the issue of a single conspiracy was never submitted to the jury, the evidence supported a single conspiracy and that the "Supreme Court has severely limited the applicability of *Kotteakos* (328 U.S. 750) in the case of *Blumenthal v. United States* (1947), 332 U.S. 539", (4) that there was no misjoinder of parties or charges and that severance motions were properly denied, (5) that reversal was not required under *Bruton v. United States*, 391 U.S. 123 (1969), (6) that there was no error in the District

Judge's charge; (7) that before grand jury testimony of key witnesses could be made available for impeachment purposes, particularized need had to be shown, and (8) that although it was improper for the prosecution to express opinions before the original grand jury herein, no reversible error was committed by this and other alleged misconduct.

STATUTES AND RULES INVOLVED

18 U.S.C. 243 provides, in part:

> "No citizen possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any state on account of race, color, or previous condition of servitude***".

28 U.S.C. 1861 (Public Law 90-274, 82 Stat. 53) now provides that:

> "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."

28 U.S.C. 1863(c) provides:

> "No citizen shall be excluded from service as grand or petit juror in any court of the United States on account of race or color."

18 U.S.C. 1952 provides, in part:

> "(c) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mails, with intent to–
>
> * * *
>
> "(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of an unlawful activity, and thereafter performs or attempts to perform any of the acts specified in sub-paragraphs (1), (2) and (3) shall be fined not more than $10,000 or imprisoned for not more than five years or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, * * *, offenses in violation of the laws of the state in which they are committed in the United States* * *".

Rule 14 of the Rules of Criminal Procedure provides:

"RELIEF FROM PREJUDICIAL JOINDER

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

Section 2190 of the Mississippi Code provides as follows:

"GAMBLING – WAGERS GENERALLY

"If any person shall encourage, promote, play at any game or amusement, for money or other valuable thing, or shall wager or bet, promote or encourage the wagering or betting any money or other valuable things, upon any game, play, amusement, cockfight, Indian ball play, or duel, or upon the result of any election, event, or contingency whatever, upon conviction thereof, he shall be fined in a sum not less than five dollars nor more than five hundred; and unless such fine and costs be immediately paid, shall be imprisoned for any period, not more than twenty days nor less than five days."

Section 2192 of the Mississippi Code provides:

"GAMBLING–keeping or being interested in games or gaming tables.

"If any person shall be guilty of keeping or exhibiting any game or gaming table commonly called A.B.C. or E.O. roulette or rowley-powley, or rouge et noir, roredo, keno, monte or any faro-bank, or other game, gaming table, or bank of the same or

like kind, or any other kind or description under any other name whatever, or shall be in any manner either directly or indirectly interested or concerned in any gaming tables, banks, or games, either by furnishing money or articles for the purpose of carrying on the same, being interested in the loss or gain of said table, bank or games, or employed in any manner in conducting, carrying on, or exhibiting said gaming tables, games or banks, every person so offending and being thereof convicted, shall be fined not less than twenty-five dollars nor more than two thousand dollars, or be imprisoned in the county jail not longer than two months, or by both such fine and imprisonment in the discretion of the court."

REASONS FOR GRANTING THE WRIT

1. In selecting the grand and petit jury, prior to Public Law 90-274, 82 Stat. 53 (18 U.S.C. 1861), there was a purposeful limitation in the jury array of the Negro race to 33 1/3% and of male jurors to 48% to conform to the same proportions as such persons appeared in the 1960 Mississippi census. This type of limitation or proportional representation is odious to our thought, our Constitution and 18 U.S.C. 243. *Cassell v. Texas,* 339 U.S. 282, 286-7 (1950); *Brown v. Allen,* 344 U.S. 443, 470-4 (1966).

Jury selection is an individual and not a class matter *Ballard v. United States,* 329 U.S. 187, 193 (1946). Neither sex nor race should be a criteria or a limitation in selecting a fair cross section. If consideration should be given to the racial and sex population proportions of each state or judicial district, then consideration should also be given to the religious, political and other characteristics of the population. The method employed here required invalidation of the indictment *Hill v. Texas,* 316 U.S. 400 (1942) and conviction *Whitus v. State of Georgia,* 385 U.S. 545 (1967).

2. The Court of Appeals ruled that *Kotteakos v. United States,* 328 U.S. 570 (1946) has been "severely limited" by *Blumenthal v. United States,* 332 U.S. 539 (1947) which held that under the "special circumstances" and "unique

facts" there presented a single conspiracy was established by the evidence. In its application of the *Blumenthal* interpretation to the instant case, the Court nullifies the salutary doctrine forbidding allegations of more than one conspiracy in a single count. This issue merits the attention of the Supreme Court.

In their pretrial motions petitioners attacked Count One of the indictment, asserting that it charged; *first*, a conspiracy to transport electro-magnets in interstate commerce for installation in the Red Carpet Club in March 1965, *secondly*, an intrastate conspiracy to transfer it in August or September, 1965, to Deano's Lounge, *thirdly*, a conspiracy to cash checks through the Check Cashing Service account, and, *fourthly*, a conspiracy to cash checks through the A.D. Marks Account in October and November, 1965. The Government, in opposition, asserted that evidence would be produced at the trial from which the jury could conclude that only a single simple conspiracy existed.[1] The evidence never was forthcoming.

On the contrary, the evidence adduced at the trial through the Government's key witnesses, Robert Bennett (R. 1134), Maurice Arnold (R. 1486-7), and Jean Proctor (R. 1303, 1336-9) all named as co-conspirators and through testimony of defendants Harvey Hutchins (Tr. 1652, 1674-5), and Alice Dianne Whitmire (Tr. 1774) was consistently to the effect that there was no relation between the deposit of so-called gambling checks in the Check Cashing Service and A.D. Marks accounts and the interstate transportation of the electro-magnets. There was likewise no connection be-

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[1]Government counsel stated at the pretrial hearing (Tr. 54) that it was a single conspiracy "to violate 1952 by using interstate facilities, on the one hand the U-Haul Trailer, by the mails on the other. All with the common purpose to promote an unlawful activity of gambling. And it's a very simple conspiracy, different methods by which to achieve the conspiratorial agreement, that is, to further gambling at the Red Carpet. It's very simple, Your Honor."

tween the Check Cashing Service and the A.D. Marks account. This evidence was uncontradicted.

The alleged conspiracy to create an A.D. Marks account in October, 1965 (R. 1266), was a separate transaction occurring apart from and after any electro-magnet transportation, apart from any Check Cashing Service account. It was a matter solely between Dewey D'Angelo and Alice Dianne Whitmire. The latter received a percentage of the checks cashed and the other defendants had no part of it (Tr. 1774-7). The transaction was distinct in time from the matters charged in the other parts of the indictment. There was no single agreement or concerted action by all defendants involving the depositing of checks in the Check Cashing Service or A.D. Marks accounts. Count One charged and the evidence disclosed several conspiracies. Where a charge is made of a single conspiracy, as Count One alleges, and the evidence shows, as it did here, that there were not one but several conspiracies, the conviction must be reversed. *Kotteakos v. United States,* 328 U.S. 750 (1946); *Canella v. United States,* 157 F.2d 470 (9th Cir., 1946); *Rocha v. United States,* 288 F.2d 545 (9th Cir., 1961); *United States v. American Honda Motor Company,* 273 F. Supp. 810 (N.D. Ill., 1967).

On the evidence presented, as a matter of law, several conspiracies were shown. The Courts below erroneously ruled to the contrary (Tr. 1873-4). A judgment of acquittal on Count One should have been directed. If an issue of fact existed on this point, then it should have been submitted to the jury as requested in proposed instruction of petitioner Jack Kress (Tr. 2093). See *United States v. Nuccio,* 373 F.2d 168 (2d Cir., 1967); *United States v. Maxwell,* 383 F.2d 437 (2d Cir., 1967); *Lefco v. United States,* 74 F.2d 66 (3rd Cir., 1934).

The joinder of the substantive counts herein relating to the electro-magnet transportation and the cashing of checks was based upon the fact of a single conspiracy involving these matters. If Count One involved several conspiracies, such joinder was highly prejudicial and improper.

The rulings below in refusing to submit the multiple conspiracy issue to the jury were contrary to the views of the Second and Third Circuits.[2] Moreover, the interpretation that *Kotteakos v. United States,* 328 U.S. 570 (1946) has been severely limited by *Blumenthal v. United States,* 332 U.S. 539 (1947) is a view not shared, followed, or expressed by other circuits. *Rocha v. United States,* 288 F.2d 545, 553 (9th Cir., 1961); *United States v. Nuccio,* 373 F.2d 168 (2d Cir. 1967). The importance of this issue which has produced a conflict of circuits deserves Supreme Court review.

3. Two key witnesses herein were Robert Bennett and Maurice Arnold. Both were named as co-conspirators but not indicted, both had felony convictions, were on probation (R. 1206-7, 1490-2), and the testimony of both was essential to proof of the conspiracy and substantive charges herein. Both witnesses had bad reputations for truth and veracity (R. 304-5, Tr. 1619-20), and both had testified to hearsay declarations admissible solely on the conspiracy charge (R. 1056-1106, 1376, 1403, 1588-89). Moreover, in the case of each witness, the Government opened the door to revelation of their grand jury testimony by eliciting that they had told the truth, without promises of leniency, before the grand jury (R. 1112-4, 1455-6).

At the close of the testimony of each witness counsel renewed pretrial motions (Pretrial Tr. 207-218) and requested the production of their grand jury statements pursuant to *Dennis v. United States,* 384 U.S. 855 (1966). In each instance, the Government objected solely because of a claim of secrecy (R. 1118-33, 1459-66). In each instance the District Court denied access to the same after an in camera

[2]The decision below departs from previous rulings of the Fifth Circuit. In *Brooks v. United States,* 164 F.2d 142 (5th Cir., 1947) it was held that due process required proof of the precise conspiracy charged and in *Jolley v. United States,* 232 F.2d 83 (5th Cir., 1956) it was said that "it was for the jury to say whether there was any conspiracy and if so whether one or more than one."

inspection and a finding that there were no material inconsistencies (R. 1118-33, 1459-66, 1598-99).

The Court of Appeals affirmed this denial upon the ground that "the test of particularized need must be met before the secrecy of the grand jury may be breached." This ruling is contrary to *Dennis v. United States,* 384 U.S. 855 (1966), *Alderman v. United States,* 394 U.S. 165, 183 note 14 (1969). It is contrary to the views of other circuits, *United States v. Youngblood,* 379 F.2d 365 (2d Cir., 1967); *Cargill v. United States,* 381 F.2d 849 (10th Cir. 1967), and *Allen v. United States,* 390 F.2d 476 (D.C. Cir., 1968) as acknowledged by the Court below. The issue presented is one of recurring importance in the trial of criminal cases and presents a conflict of circuits which should be settled by this Court.

4. Defendants moved herein for inspection of their several admissions and severance (Pretrial Tr. 149-160, 329-332). Upon the basis of Government counsel's representation at the pretrial argument alone, the District Court should have granted this motion under Rule 14 of the Rules of Criminal Procedure, and under principles enunciated in *Bruton v. United States,* 391 U.S. 123 (1968); *Roberts v. Russell,* 392 U.S. 293 (1968); *Serio v. United States,* 392 U.S. 305 (1968); *United States v. Bozza,* 365 F.2d 206, 214-218 (2d Cir., 1966); *Barton v. United States,* 263 F.2d 894 (5th Cir., 1959); and *Atwell v. United States,* 398 F.2d 507 (5th Cir., 1968).

At the pretrial hearing Government counsel[3] advised the Court (Pretrial Tr. 157):

> "I would say your Honor, that we have statements as to all defendants in this case, from all defendants. The statements actually * * * implicate each other. * * * I'm sure many of the statements in

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[3]Referring to the Supreme Court and its severance decisions, Government counsel remarked, "I honestly don't think they realize what they're doing." (Pretrial Tr. 332).

> this case, your Honor, can't be masked. Some of the defendants in this case have admitted the conspiratorial charge in this case."

The evidence developed at the trial later sustained this representation.

Subsequent to the termination of the alleged conspiracies herein each of the defendants made incriminatory statements to agents of the Federal Bureau of Investigation. Agents testified to the contents of each statement. Objections made to each statement were met with a ruling that it was admitted solely as against the defendant who made the statement.

The following is a listing of twenty statements admitted in evidence solely against a single defendant under the District Court's ruling:

(a) Special Agent Duke testified that Orrels admitted that he went with another man in the other man's 1964 white Cadillac automobile[4] from Mississippi to Tulsa where they rented a U-Haul Trailer which they drove back to Mississippi. He said with regard to the contents, we would be a fool to admit anything which would be a violation of federal law. (R. 101-111).

(b) Special Agent Toole, Jr., testified that James admitted going to Tulsa, refused to identify whom he contacted there or who went with him. He acknowledged he pulled a trailer from Oklahoma to Mississippi but would not identify the contents, stating if he answered that question he would be admitting to a violation of federal law and that you can't operate a gambling establishment without dice and cards. (R. 132-134).

(c) Robert Bennett testified that his deceased father told him that the juice joint of the Red Carpet was bought from Kress. (R. 1078).

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[4]The white Cadillac was identified as one owned and operated by petitioner, Donald Lester James (R. 152-8, 1005-16).

(d) Fay Chase testified that James advised her to state that she knew nothing about the case. (R. 1645-50).

(e) Dolores Savoy testified that James told her that he brought the juice joint to the Red Carpet. (R. 1712).

(f) Dolores Savoy testified that James told her he brought the juice joint in his trailer. (R. 1715).

(g) Paul Brown testified that James told him he had a 10% interest in the Red Carpet Club. (R. 1780).

(h) Paul Brown testified that Rolling stated he had a 50% interest in the Red Carpet Club. (R. 1780-1).

(i) Paul Brown testified that Dewey D'Angelo told him that there was a juice joint in the Red Carpet. (R. 1782).

(j) Paul Brown testified that Dewey D'Angelo stated to him that he had a 40% interest in the Red Carpet and that he had sent for Jack (Kress) to come and repair the juice joint at Deano's Lounge. D'Angelo told Brown that it cost $3,500 to bring Kress to Mississippi. (R. 1791-2).

(k) Paul Brown testified that Harry Bennett said that Dewey D'Angelo had better pay Jack Kress the $3,500 he owed him. (R. 1792).

(l) Paul Brown testified that Dewey D'Angelo said that defendant, Dianne Le Seur (Whitmire) was going to take care of the checks. (R. 1794-5).

(m) Special Agent Graben testified that defendant, Hutchins, admitted setting up the Check Cashing Service with himself as President and Jean Proctor as Secretary. (R. 1215a-20).

(n) Special Agent Graves testified that defendant Whitmire was asked by an individual to open a fictitious bank account (A. D. Marks account) so that checks from Deano's Lounge could be deposited there. (R. 1242-6).

(o) Richard Yarborough testified that he told defendants, Hutchins and Dewey D'Angelo not to take and cash interstate gambling checks because it violated the law.

Hutchins replied that such transactions did not violate the law. (R. 291-300).

(p) Maurice Arnold testified that defendant, James, remarked that we could imagine how much difficulty he and defendant Lanky (Orrels) had loading the juice joint because they loaded it by themselves. (R. 1403).

(q) Clinton Nelson, manufacturer of brass dies, testified that Jack Kress requested him to destroy his records. (R. 420-1).

(r) Sheriff McDonnell testified that Dewey D'Angelo admitted that he had a juice joint at Deano's Lounge and that McDonnell told him to remove it. (R. 1833-39).

(s) Special Agent Jansen testified that D'Angelo admitted to him that he recalled a conversation at the Red Carpet Club about getting a juice joint, that one was installed in the Club, although he was not there at the time, that after the Red Carpet was closed it was moved to Deano's Lounge and he received $5,000 from a certain person (obviously Kress) who lent him money sent by Western Union to help with the operation. He admitted that he received shipments of playing cards under fictitious names (a reference again to Jack Kress) and that he received dice to be used with the juice joint. (R. 440-50).

(t) Special Agent Toole testified he interviewed Rolling who refused to admit anything about the juice joint but stated that he had never seen crooked gambling before he came to the Gulf Coast. (R. 499-503).

The admission of some of these statements, without benefit of confrontation or cross-examination violated *Bruton v. United States,* 391 U.S. 123 (1968). Apart from *Bruton,* however, petitioners were denied a fair trial and due process by the introduction of the statements set forth above.

As noted in *Sims v. United States,* 405 F.2d 1381-3 (D.C. Cir., 1968), it would have been difficult for the trial court to recall to the jury in its charge the many occasions

on which statements were admitted and which statements were admissible against which defendant. There is a point where credulity as to the efficacy of limiting admissions implicating co-defendants is overstrained. "This case is a classic example of when prejudice cannot be erased and severance is called for", *Sims v. United States, supra.*

Not only was there prejudice by reason of twenty admissions received in evidence against a single defendant, but the trial of the juice joint issue with that of the check cashing charge adversely influenced consideration of each offense to the detriment of those who were involved solely in a single charge. This was particularly true with regard to James, Kress and Orrels, who were not implicated in check cashing and Whitmire[5] and Hutchins who were not implicated in the juice joint.

The conflict between the decision below and the *Sims* case presents an important issue warranting further review.

5. The misconduct of one of the prosecutors herein denied petitioners a fair trial. This misconduct partially noted by the courts below raises issues of great consequences and grave concern in the administration of criminal justice which require review. The duty of the Government officials who conduct a criminal prosecution is not to secure an indictment or conviction but to see that justice is done. *Berger v. United States,* 295 U.S. 78, 88 (1934); *Jencks v. United States,* 353 U.S. 668, 671 (1956). Here the prosecution sought to indict and convict by means fair or foul.

(a) Government prosecutor Owen Neff, advised Maurice Arnold, a key prosecution witness and alleged co-conspirator, to falsely inform defense counsel and others who sought to interview him that he claimed the Fifth Amendment before the grand jury. Maurice Arnold so advised defense counsel

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[5]The District Court had grave misgivings about denying Whitmire's motion for judgment of acquittal. (R. Tr. 1865, 1867).

in August, 1966, curtailing further interrogation and misleading them. (R. 1456-8, 1482-4, 1508). This misconduct was aggravated by the District Court's erroneous statement before the jury that it was the duty of the witness, Maurice Arnold, not to reveal what happened before the grand jury and to evade answering questions, if he chose to do so. (R. 1509). The Court of Appeals approves this by neglecting to even mention this grave Governmental transgression which was the subject of briefs and argument below. Telling a key witness to falsify that he had taken the Fifth Amendment before the Grand Jury misleads those who interview him about this subject and effectively curtails the interview even more than instructing him to refuse to talk at all. In the latter case the interviewer knows the witness is hostile. Where the interviewer is misled he neglects to pursue the matter further and may not be as fully prepared at trial. This was suppression, falsification and obstruction by the Government which cannot go unnoticed. It violated ethical standards, due process and elementary fairness. *Gregory v. United States*, 369 F.2d 185, 189 (D.C. Cir., 1966); *Coppolino v. Helpern*, 266 F.Supp. 930, 936 (S.D. N.Y., 1967). It deprived petitioners of a fair trial.

(b) When the first indictment herein was made public (Case No. 8623) the Federal Bureau of Investigation issued a press release dated July 21, 1966, discussing the return of this indictment and four others and stating in part (Pretrial Tr. 221-2):

> "Mr. Hoover stated that the FBI's investigation into gambling activities on the Gulf Coast of Mississippi was initiated after two electromagnets, each weighing approximately one ton, were discovered in the concrete floor of a gambling establishment in Biloxi. The magnets, commonly known as 'juice joints' were shipped into Mississippi from out of state. The magnets, which were located underneath a dice table, permitted the operator at the dice table to control the roll of 'loaded dice' through the use of an electric current energized through the 'juice joint'."

The press release then listed the occupations of defendants describing Whitmire as an "entertainer, cocktail waitress, card dealer and bartender"; Orrels as "reportedly a gambler"; Rolling as a "laborer"; and Kress as "a manufacturer of gambling equipment".

This press release produced front page publicity for the case with pictures of each defendant—pictures furnished by the Government. It kept the case as a front page news story throughout the second indictment and the trial herein. The press release went beyond the facts in the indictment and was improper and prejudicial. It violated Canon 20 of the American Bar Association[6] and the rules of the Department of Justice promulgated on April 16, 1965, in 28 C.F.R. 50.2, having the force and effect of law. It impeded the due administration of justice.[7] *State v. Van Duyne,* 43 N.J. 369 (1964), and required the grant of petitioners' motion for a change of venue. *Delaney v. United States,* 199 F.2d 107 (1st Cir., 1952).

(c) The Grand Jury returned the first indictment herein on July 19, 1966. Prosecutor Owen Neff, in the presence of the Grant Jury, advised defendant Rolling, who had been subpoenaed as a witness, that his conduct was the equivalent of robbery, only he used an electro-magnet (a juice joint) not a gun (Pretrial Tr. 55). The Government does not deny that when the present superseding indictment was

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[6]Canon 20 provides: "Newspaper publication by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are condemned." Here, the FBI acted for the Department of Justice. An agent sat at the counsel table throughout the trial. Eleven agents were witnesses for the prosecution. It was from start to finish an FBI case.

[7]See *Free Press and Fair Trial, Hearings of Senate Judiciary Committee on S. 290,* 89th Cong., 1st Sess. (1966), and *Reardon Report and Resolution* adopted by American Bar Association on February 19, 1968.

secured, the second grand jury was advised of the earlier indictment secured through the misconduct noted above (Pretrial Tr. 76).

Neff's conduct was highly improper. The District Court and the Court of Appeals concurred (Pretrial Tr. 87-88, App. B). A Government attorney should not dominate the grand jury or control its findings. He should not express an opinion as to the sufficiency of evidence, even before it has been fully presented. 1 *Orfield, Criminal Procedure Under the Federal Rules,* p. 384 (1966); *United States v. Wells,* 163 Fed. 313, 325 (W.D. Idaho, 1908); *United States v. Huston,* 28 F.2d 451, 452 (D.C. Ohio, 1928). The misconduct of the Government which permeated both indictments required dismissal.

6. The general exploratory search and seizure herein of truck loads of materials from petitioner, Jack Kress, raises an issue of recurring importance in law enforcement.

Jack Kress moved by pretrial motions (Pretrial Tr. 244-299) and at the trial herein to suppress numerous items seized at his home, in his automobile, and manufacturing plant in Tulsa, Oklahoma, on July 21, 1966. Application for relief was made both in the United States District Court, Northern District of Oklahoma (Civil Action 67-C-38), where on May 2, 1967, lathes, drilling machines, electric motors, drill presses, a milling machine and technical manuals, were ordered returned. The Oklahoma District Court deferred to any ruling to be made in Mississippi. The District Court in Mississippi reaffirmed this ruling but refused to suppress any items offered at the trial herein (Pretrial Tr. 282, 294, 298).[8]

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[8]The District Court observed, "I'm not by that saying that I agreed that everything that was seized should have been seized. I'm not sure about that at all" (Pretrial Tr. 284). Thereafter, by opinion dated July 25, 1968, and order dated August 20, 1968, the District Court directed the return of all items not used as evidence at the trial. More than 150 items were ordered returned.

Kress was indicted for the first time herein (Criminal Action No. 8623) on July 21, 1966, when he was arrested at 7:31 a.m. (Tr. 1425). Identical affidavits had been prepared the same day (Pretrial Tr. 249-50) and they furnished the basis for three warrants to search and seize property at the home, manufacturing plant and automobile of Jack Kress. Seven or eight agents of the Federal Bureau of Investigation searched his manufacturing plant which was broken into when there was no response (R. 527-9, 545). Jack Kress, of course, was in custody at the time the plant was raided. Articles seized were removed in two trucks (Tr. 1425, R. 529). The items seized included telephone bills, folders of customers, empty files, all types of electrical equipment and machinery, dice, cards, machinery manuals, one dice table top and raw material for dice. The wide extent of the items seized is revealed by the inventory (Court's Exhibit 1) and the 154 photographs comprising Exhibit P-33. Seven agents of the Federal Bureau of Investigation (Tr. 1421-1573, R. 582-726) testified before the jury with telling effect to the contents of the seizure.

The three affidavits for warrants each alleged that the affiants (Agents of the Federal Bureau of Investigation, Pearson and McConnell) had reason to believe that there "is now being concealed" in:

(i) defendant's residence,
(ii) defendant's automobile,
(iii) defendant's manufacturing plant,

the following:

> "gambling paraphernalia, including, but not limited to dice, crap tables, wires, coils, solenoid switches, records, sales receipts, customers' lists, shipping orders, supplies, machine equipment, machine tools for the manufacture of gambling paraphernalia, including but not limited to dice, crap tables and cards which are now being used and have been used to engage in the manufacture and interestate transportation and sale of said articles in violation

of Title 18, Section 1952 and 1953, United States Code." (Pretrial Motion and Pretrial Tr. 278-9).

The Fourth Amendment affirms the "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures" and decrees that "no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and persons or things to be seized."

Here, the place to be searched was particularly described. Here, the person involved was particularly described. But, the things to be seized were not described with like particularity.

The Court of Appeals sustained the sufficiency of a generic description of items to be seized upon the basis of necessity and *Spinelli v. United States*, 382 F.2d 871 (8th Cir., 1967) reversed 393 U.S. 410 (1969).

General search warrants and exploratory searches are contrary to the Fourth and Fifth Amendments. *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *United States v. James*, 378 F.2d 88 (6th Cir., 1967).

In *Stanford v. Texas*, 389 U.S. 476 (1964), a warrant was issued describing petitioner's home and authorizing the search and seizure there of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas". It was held that such search warrant did not describe with particularity the things to be seized and violated the Fourth Amendment.

In *Marron v. United States*, 275 U.S. 192, 196 (1927), it was said:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing

another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

Here, the executing officers were authorized to seize "records * * * supplies * * * machine equipment, machine tools". It authorized the seizure of everything and practically anything found in Kress' manufacturing plant from an ordinary power saw to drill presses, an eye shade, telephone bills, card index, three cardboard boxes containing records, empty folders, a wooden table stand, a vise, a lathe, an electric motor, and a cardboard carton containing technical manuals and papers. All of the foregoing were actually seized. Many of these items were introduced in evidence through photographs (P-33), by way of an inventory (Court's Exhibit 1), or as independent exhibits (P-34-43). They should have been suppressed. The search and seizure were illegal and unconstitutional.

The main deficiencies of the affidavits supporting the search warrants herein are fourfold:

(a) They were based upon events remote in time and do not sustain a conclusion that petitioner, Kress, was engaged in violation of federal law at the time of the arrest and seizure. *United States v. Sawyer,* 213 F.Supp. 38, 40 (E.D. Pa., 1963); *Schoeneman v. United States,* 317 F.2d 173, 177 (D.C. Cir., 1963).

(b) They were based upon hearsay without demonstration of the reliability of sources of information and were insufficient. *Aguilar v. Texas,* 378 U.S. 108 (1964); *United States v. Freeman,* 358 F.2d 459 (2d Cir., 1966); *United States v. Pearce,* 275 F.2d 318 (7th Cir., 1960); *United States v. Follette,* 267 F.Supp. 337 (S.D. N.Y., 1967); *United States v. Pinkerman,* 314 F.2d 988 (4th Cir., 1967).

(c) They do not support probable cause that Kress was violating 18 U.S.C. 1952 or 1953 at the time of the execution of the affidavits. They fail to show travel in interstate commerce with an intent to promote a business enterprise involving gambling in any particular locality or with the

individuals named. *United States v. Zizzo*, 338 F.2d 577 (7th Cir. 1964); *United States v. Teemer*, 214 F.Supp. 952 (N.D. W.Va., 1963); *Bass v. United States*, 324 F.2d 168 (8th Cir., 1963). It should be noted that 18 U.S.C. 1953 involves interstate shipment of equipment for bookmaking, wagering or numbers games. The Government did not press the point that any violation of 18 U.S.C. 1953 was shown.

(d) They rely, as noted by the Court below, upon a Justice Department attorney (Owen Neff) as a source that evidence had been developed before the Grand Jury in Jackson, Mississippi. This source furnished a conclusory statement and failed to set forth underlying circumstances as is required by *Spinelli v. United States*, 393 U.S. 410 (1969).

We submit, therefore, that the evidence seized herein, as well as all other items taken from Kress' manufacturing plant should have been suppressed and returned to him. The exhibits (P-33-43, Court's Exhibit 1) were introduced to establish that Kress was, as prosecutor Owen Neff declared (Pretrial Tr. 264), a manufacturer and seller of "crooked gambling equipment". They constituted highly prejudicial evidence which should have been suppressed. Their receipt in evidence constituted reversible error infecting the case against Kress and his codefendants (*Gillespie v. United States*, 368 F.2d 1 (8th Cir., 1966)).

7. Construed as a whole (*Boyd v. United States*, 271 U.S. 104, 107 (1926)) the District Court's charge to the jury was confusing (*Ballenbach v. United States*, 326 U.S. 607 (1946)) and erroneous. Appropriate objections were taken in each instance detailed herein.

(a) The District Court charged the jury that:

> "Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs" (R. 939).

The Court further advised the jury:

> "In trying this case you should not hunt for doubt

with the view of finding some excuse or explanation for your verdict * * *." (R. 942).

Exceptions were noted to these portions of the Court's charge (Tr. 2101).

It was error to so charge the jury. In *Scurry v. United States,* 347 F.2d 468, 470 (D.C. Cir., 1965), Judge Wright observed:

> "Being convinced beyond a reasonable doubt cannot be equated with being 'willing to act * * * in the more weighty and important matters in your own affairs'. A prudent person called upon to act in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks tending in both directions. But, in making and acting on a judgment after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Human experience, unfortunately, is to the contrary."

Holland v. United States, 348 U.S. 121, 140 (1954), likewise is at variance with the charge. There, the Supreme Court noted that:

> "We think this section of the charge should have been in terms of the kind of doubt that would make a person *hesitate to act* * * * rather than the kind on which he would be *willing to act* * * *." (Emphasis supplied).

Advising the jury, in addition, not to hunt for doubts was confusing and erroneous. In effect the jury was being told not to search the evidence for doubts. If reasonable doubts existed in the government's case, there was no basis for instructing the jury not to find them by search, by hunting them out or finding them in any proper manner.

(b) The jury was erroneously instructed over objections that Count Two charged that James and Orrels transported a juice joint in interstate commerce to promote an unlawful gambling business in Mississippi and that thereafter "*defend-*

ants promoted such unlawful gambling business at the Red Carpet Club and Deano's Lounge". The jury was also erroneously instructed over objection that the defendants could be convicted if James and Orrels transported the juice joint for unlawful gambling and then "any defendant promoted illegal gambling at the Red Carpet Club or Deano's Lounge" (R. 997).

Under these instructions, the principals were not required to be guilty of each element of the offense under 18 U.S.C. 1952. They were not required to promote unlawful gambling subsequent to the transportation.[9] It was only necessary that any defendant do so without specification. As proposed, this instruction (No. 21, Tr. 2090) had limited defendants to James and Orrels. With any defendant guilty of promoting unlawful gambling subsequent to the transportation, an aider or abettor could be convicted. To convict as an aider or abettor, the principal must first be guilty of the crime. *Edwards v. United States,* 286 F.2d 681 (5th Cir., 1960); *Colosacco v. United States,* 196 F.2d 165, 167 (10th Cir., 1952). The court did not make this point to the jury although requested to do so. On the contrary, the jury was advised that a principal need not be guilty of all the necessary elements of the crime under 18 U.S.C. 1952. Nor was the evidence sufficient to show that the alleged aiders and abettors herein were guilty of "counselling or other assistance in the prohibited activity" of transporting a juice joint in interstate commerce and thereafter facilitating the promotion of unlawful gambling in Mississippi. *Grimes v. United States,* 379 F.2d 791 (5th Cir., 1967).

When multiple parties are tried together, partial identification cannot convict all defendants. Proof of the identity of the person who committed the crime and proof of all elements of the crime under 18 U.S.C. 1952, are essential

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[9]The record fails to show any gambling activity by Orrels after the alleged interstate transportation.

to sustain a conviction herein under Count Two. See *Butler v. United States,* 317 F.2d 249, 254 (8th Cir., 1963). Here, the jury was left to speculate as to who was the principal herein and was guilty of all the elements of the crime under Count Two.

(c) At the Government's request the District Court charged the jury "that evidence of a substantial course of illegal conduct occurring a reasonable time before, during, and after acts of interstate travel or acts of using any facility of interstate commerce, including the mail, will allow you to infer that the travel or use of any facility of interstate commerce, including the mail, was undertaken with intent to carry on the unlawful activity, namely a business enterprise involving gambling in violation of the laws of the State of Mississippi" (Tr. 2051-2, 2102, R. 971).

This charge was erroneous and highly prejudicial. It may well be that "the purpose for which interstate transportation is undertaken may be inferred from the conduct of the parties within a reasonable time before and after the transportation." *Flanagan v. United States,* 308 F.2d 841, 842 (5th Cir., 1964), cert. denied 384 U.S. 951; *Lindsey v. United States,* 277 F.2d 113, 117 (5th Cir. 1955). However, that is not what the Court below charged the jury. It charged that any course of illegal conduct, without specification as to persons or the nature of the same, would give rise to a conclusion that it was with intent to violate the gambling laws of Mississippi. Thus, a course of illegal conduct by co-conspirator Maurice Arnold in stealing automobiles or by defendant Rolling in gambling in Louisiana would give rise to an inference that appellant Orrels transported a juice joint into Mississippi with intent, contrary to 18 U.S.C. 1952, or that defendant Hutchins used the mails with intent contrary to 18 U.S.C. 1952. We submit that such is not the law. Only the course of recent illegal conduct of a particular defendant could be utilized to ascertain his intent before and after transportation. The charge was misleading, incorrect and prejudicially erroneous.

The instructions were also deficient and erroneous by reason of their failure to grant the following requests of petitioners:

(a) Request No. 7,[10] that mere knowledge of the conspiracy or failure to prevent it from being carried out without affirmative consent did not make one a member of it (Tr. 2092). *Duke v. United States,* 233 F.2d 897, 901 (5th Cir., 1956); *Marino v. United States,* 91 F.2d 691 (9th Cir., 1937), cert. denied 302 U.S. 764.

(b) Request No. 8, that mere association did not establish a conspiracy (Tr. 2092-3).

(c) Request No. 9B, the necessity of finding a single conspiracy to convict under Count One (Tr. 2093).

(d) Request No. 12, that mere knowledge, sympathy or approval of a conspiracy did not constitute one a conspirator (Tr. 2094). *United States v. Falcone,* 311 U.S. 205, 210 (1940).

(e) Request No. 14A and 14B, that a conviction on the use of the mails in cashing gambling checks required knowledge of the use of interstate commerce to cash checks (Tr. 2094). *United States v. Barnes,* 383 F.2d 287 (6th Cir., 1967); *United States v. Interstate Engineering Corp.,* 288 F.Supp. 402, 420 (N.H., 1967).

(f) Request No. 21 (Tr. 2090), the necessity of finding a principal guilty beyond a reasonable doubt before considering guilty of an aider or abettor. As modified by the Court, this instruction misstated the law (R. 997).

(g) Request No. 22 (Tr. 2095). The Court refused to give, in accordance with principles enunciated in *Knauer v. United States,* 328 U.S. 654 (1946), and *Davis v. Commissioner,* 184 F.2d 86 (10th Cir., 1950), an instruction that all counts required a criminal intent or bad purpose, that such purpose or intent could not be presumed and

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[10]The requests of petitioner, Jack Kress, were adopted by all the other defendants (Tr. 2100).

that "if motive and design of an act may be traced to an honest and legitimate source equally as to a criminal one, the honest and legitimate source must be preferred". This was reversible error.

CONCLUSION

For the reasons set forth herein, certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX A

(R. 522)

Judgment and Commitment (Rev. 7-52)*

Cr. Form No. 25a

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI – SOUTHERN DIVISION

UNITED STATES OF AMERICA

v. No. 8718 – Indictment

DONALD LESTER JAMES

On this 13th day of May, 1968, again came the attorney for the government and the defendant appeared in person and[1] by his counsel, Michael A. Maroun, and upon arraignment on March 24, 1967, the defendant entered a plea of not guilty;

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty by a jury on January 18, 1968, of the offense of violating Sections 1952, 2 and 371, Title 18, United States Code:

**Ivan Orrels* was sentenced to 5 years and fined $5,000.00 on Count 2. *Dewey D'Angelo* was sentenced to 3 years on Count 1, 2 years consecutively, for a total of 5 years on Count 2, and fined $3,000.00. Sentence was suspended on Count 3. *Alice Dianne Whitmire* was sentenced to 3 years on Counts 1 and 4, the sentences to run concurrently. Jail was prescribed for 6 months and 2 years and 6 months suspended, 5 years probation to commence after jail sentence. *Jack Edward Kress* was sentenced on June 24, 1968 to 5 years and fined $5,000.00 on Count 1 and given 5 years probation and fined $10,000.00 on Count 2. *Harvey Hutchins* was sentenced to 3 years on Counts 1 and 3 with jail for 6 months and 2 years and 6 months suspended. 5 years probation and disbarment from the District Court was ordered. *Raymond Rolling* was sentenced to 3 years on Count 1. All sentences were entered on May 13, 1968 except that of Jack Edward Kress.

unlawful use and aiding and abetting and causing the use of facilities in interstate commerce with intent to carry on and facilitate the carrying on of unlawful gambling activities in Mississippi, and conspiracy to do so, as charged[3] in Counts 1 and 2 of the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4]

Count 1: Five (5) years and pay a fine in the amount of $5,000.00

Count 2: Imposition of sentence be suspended and pay a fine in the amount of $5,000.00

and that said defendant be further detained until payment of said fine or until said defendant is otherwise discharged as provided by law.

IT IS ADJUDGED that[5] the fines imposed on Counts 1 and 2 be cumulative making a total amount of fines of $10,000.00 to be paid. It is further adjudged that the sentence of five (5) years imposed on Count 1 be served and that defendant may become eligible for parole at such time as the Board of Parole may determine as provided in 18 U.S.C. 4208(a)(2). It is further adjudged that imposition of sentence on Count 2 be suspended and the defendant be placed on probation for a period of five (5) years, said probation to commence at the expiration of the service of the sentence imposed on Count 1, and on condition that the fine of $10,000.00 be paid within ninety days to the U.S. Probation Officer.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States

Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ HAROLD COX
United States District Judge

The Court recommends commitment to:[6]

ROBERT C. THOMAS
Clerk

A True Copy. Certified this 13th day of May, 1968.

(Signed) ROBERT C. THOMAS (By) /s/ S. RICHMOND
Clerk Deputy Clerk

[Reverse side of foregoing document:]

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on to

Defendant noted appeal on .

Defendant released on .

Defendant elected, on not to commence service of the sentence.

Defendant's appeal determined on .

Defendant delivered on to at the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

_____
United States Marshal.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26162

DONALD LESTER JAMES, IVAN ORRELS, DEWEY D'ANGELO, ALICE DIANNE WHITMIRE, RAYMOND LEROY ROLLING, JACK EDWARD KRESS, and HARVEY HUTTON HUTCHINS,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Mississippi

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(September 17, 1969)

Before BROWN, Chief Judge, DYER, Circuit Judge, and HUNTER, District Judge.

HUNTER, District Judge: Appellants were tried by a jury under a four-count indictment charging them with conspiracy to violate and substantive violations of 18 U.S.C.A. 2, 371 and 1952.

Count One charged that defendants consipired in violation of 18 U.S.C.A. 371 to use certain facilities in interstate commerce with intent to carry on an unlawful gambling enterprise in violation of Sections 1952 and 2 of 18 U.S.C.A. The alleged conspiracy included the use of trailer facilities of U-Haul Trailer Company between Oklahoma and Mississippi for the purpose of transporting in interstate commerce a "Juice joint" to control dice games conducted in violation of Mississippi law. The alleged conspiracy also included the interstate use of the mails to cash gambling checks. All appellants except Orrels were found guilty on this count.

Count Two charged five appellants (Whitmire and Hutchins not included) with causing the use of U-Haul Trailer facilities in interstate commerce to transport electromagnets from Oklahoma to Mississippi, to be used at the Red Carpet Club and Deano's Lounge in Biloxi to control dice games conducted in violation of the gambling laws of Mississippi. Appellant Rolling was found not guilty of this charge. Four appellants — Jack Kress, Dewey D'Angelo, Donald James and Ivan Orrels — were found guilty. Count Three charged Bennett, D'Angelo and Harry Hutchins used the United States mails by causing the Gulf National Bank in Gulfport, Mississippi to place in the mails for collection checks drawn by John Turner on an Iowa bank with the intent to carry on an unlawful gambling enterprise in violation of Sections 1952 and 2 of 18 U.S.C.A. Only Hutchins was found guilty. Count Four charged D'Angelo and Whitmire with using the mails by causing the same bank to place in the mails checks drawn by Harold Holt on a Tennessee bank with the in-

tent to carry on an unlawful gambling enterprise in violation of the same statutes.

Appellants assert numerous errors. The conclusion of their brief reveals the vigor of their attack upon the convictions:

"CONCLUSION"

> "This was no ordinary prosecution but rather one where the Government sought to indict and convict by means fair or foul. The proceedings before the grand jury were accompanied by misconduct on the part of the prosecution and followed by an improper press release, the indictment was prejudicially conceived and framed, the defense preparation for trial was marred by governmental interference, the evidence introduced at the trial was the product of illegal search and seizure, appellants were tried by unfair utilization of hearsay and admissions received in evidence without affording appellants the rights protected by the Sixth Amendment, the Government's closing arguments were permeated by unfairness and then to climax this pyramid of prejudice and unfairness, a confusing and erroneous charge was delivered to the jury. Convictions procured in this fashion should not be permitted to stand. We urge reversal."

From our review of the record before us we cannot see any indication that appellants have been the vic-

tim of miscarried justice. The facts proved against them made the verdict inevitable. We affirm.

Able counsel have thoroughly argued and briefed their contentions. These will be treated separately, but first we shall detail some of the evidence giving rise to this prosecution so that appellant's allegations of error may be placed in proper perspective. The evidence is to be viewed in the light most favorable to the jury verdict. *Glasser v. United States,* 315 U.S. 60, 62 S. Ct. 457.

SUMMARY OF EVIDENCE

The Government's witnesses consisted of eleven F.B.I. agents, four state officials and thirty-one additional witnesses, together with some forty-three exhibits. The evidence reveals that a gambling casino, the Red Carpet Club, was opened in Harrison County, Mississippi, in November of 1964. It was located in the former home of Harry Bennett, who was indicted as a co-conspirator but died before trial. Defendant D'Angelo was the record owner of the club. Defendant Rolling owned an interest as a result of a $7,500 loan made to Bennett. Defendant James owned a ten percent interest. D'Angelo managed the "front room" of the casino. Rolling was in charge of the dice table. Business at the Red Carpet Club was poor, and in December, 1964, Bennett and James discussed the possibility of placing a device to the gambling table to control the roll of the dice. Defendant Kress came to the club and met with Bennett at that time, and when he returned in January of 1965, Maurice Arnold,

the club's maintenance man, was told by Bennett and Kress that they wanted him to install a heavy-duty voltage meter in his shop at the rear of the club, using the name of his own company, Modernistic Industries. Early in March, 1965, Robert Bennett, Harry's son and also an unindicted co-conspirator, had a conversation with D'Angelo. D'Angelo told him about the proposed installation of the control device and showed him a business card with Kress's name on it. A day or two later, Harry Bennett showed a similar card to his son and told him that he was willing to pay $15,000 for such a device. James and Orrels traveled in James's car to Tulsa, Oklahoma. They rented a heavy-duty U-Haul trailer for a one-way trip to Gulfport. They then picked up from Kress's business premises a number of heavy steel plates and wire coils and transported these items from Tulsa to Gulfport. Robert Bennett informed his father that he and Hutchins were planning to go to New Orleans, and Harry Bennett asked his son to pick up a concrete saw for Maurice Arnold. The saw was obtained and Maurice Arnold attempted to use it during the morning of March 19th to cut holes in the floor of the Red Carpet Club underneath the dice table. Present at that time were the defendants James and Rolling. When it was realized that the concrete saw would not enable them to cut sufficiently large holes to hold the steel plates, Arnold and James drove to Gulfport and rented an air hammer to finish the job. The plates and coils were removed from the trailer by James, Rolling, Arnold and two assistants, and when the holes under the table had been cut, the equipment was placed in them and wires connected from an electric power

source. The electromagnets thus created constituted the operative part of a device commonly known as a "juice joint," the purpose of which was to control the roll of the dice.

The Red Carpet people encountered considerable difficulty in collecting on checks cashed by its customers. Those who came to gamble would cash sizeable checks for that purpose and some would stop payment on their return home or would have insufficient funds in their accounts. Hutchins suggested the creation of an independent organization to cash the checks. Hutchins and Robert Bennett set up a company with Hutchins as president and Jean Proctor, an unindicted co-conspirator, as secretary. Hutchins and Robert Bennett were to receive two and one-half percent of the value of the checks handled as their commissions. The Check Cashing Service account was opened in March, 1965, by Hutchins, and it remained active, to a greater or lesser extent, until November, 1965. The use of the mails to transmit the checks cashed by customers of the Red Carpet Club (and of Deano's Lounge) was charged as an element of the conspiracy in Count One of the indictment and as an element of the substantive offenses in Counts Three and Four. Considerable evidence was adduced concerning specific instances of the cashing of checks for customers from outside Mississippi. Typical of the testimony given by the customers was that of John Shipley, who testified that he cashed a number of checks on Louisiana and Alabama banks but that, having concluded that the dice he had been playing with were loaded, he stopped payment.

The Red Carpet Club was closed by a local injunction in June of 1965. Bennett, D'Angelo and Rolling decided to move the gambling operation to a new location. Accordingly, on August 3, 1965, D'Angelo leased an emply restaurant across the street from the Red Carpet. Harry Bennett put up the money to remodel it for use as a gambling casino. Bennett was to receive forty percent of the profits from the new operation (Deano's Lounge); D'Angelo was to receive twenty percent, and Rolling was to receive ten percent. Several months later Arnold, Rolling and others moved the "juice joint" from the Red Carpet Club to Deano's Lounge. Arnold and Rolling tested the device. It worked satisfactorily for some three or four days. The main switch caught fire. Arnold called Kress in Tulsa and told him about the fire. Two weeks later Kress brought a new switch. He visited Harry Bennett in the latter's office and tried to persuade Bennett to invest sufficient money in the "juice joint" to insure that it would work efficiently, but Bennett refused to spend any more. Friction developed between Bennett and D'Angelo. D'Angelo bought out Bennett's interest in Deano's and decided to set up a new system of check collection. On October 4, 1965, he sent defendant Whitmire to the bank to open an account under the name of A. D. Marks. Whitmire, who had worked at the Red Carpet Club and was employed in the same capacity at Deano's was paid an additional commission of ten percent of the value of the checks she handled. On November 22, 1965, the Sheriff of Harrison County, having been informed by the Federal Bureau of Investigation that a juice joint was operating in Deano's Lounge, called defendant D'Angelo

to his office and told him that he wanted the device removed. The next morning at six o'clock a deputy sheriff went to Deano's and removed the magnetic plates. On that same day D'Angelo handed over to Special Agent Graben a quantity of dice, two pairs of which were magnetized and a number of mis-spotted pairs.

COMPOSITION OF THE JURY

There is no merit to the argument that grand and petit jurors were selected in an unconstitutional manner because the Jury Commission positively considered the race of Negroes in an effort to achieve a jury list which represented a fair cross-section of the community. The Clerk testified that the jury array which was summoned consisted of 52% women and 33 1/3% Negroes. These percentages conform to the identical proportions that women and Negroes appeared at the last census. This Court, sitting in banc, has implicitly approved just such a system as was used here by the Clerk of the District Court for the Southern District of Mississippi. *Brooks v. Beto* (5th Cir. 1966), 366 F. 2d 1, cert. denied 386 U.S. 975 (1967).

THE SUFFICIENCY OF THE INDICTMENT

Appellants filed timely motions to quash the indictment on the grounds that it did not charge with reasonable certainty the nature of the Mississippi gambling offense which appellants are alleged to have violated. All that is required under Federal Rules of Criminal Procedure 7(c) is that the indictment be a plain,

concise and definite written statement of the essential facts constituting the offense charged. An indictment is deemed valid when it informs the accused of the offense with which he is charged with sufficient specificity to enable him to prepare his defense and to avoid the hazard of the accused being prosecuted for the same offense. *Rood v. United States* (8th Cir. 1965), 340 F. 2d 506, cert. denied 381 U.S. 906. We are convinced that this indictment, framed in the terms of the statute, measures up to that standard. *Gilstrap v. United States* (5th Cir. 1968), 389 F. 2d 6, cert. denied 391 U.S. 913 (1968); *Turf Center, Inc. v. United States* (9th Cir. 1963), 325 F. 2d 793. The indictment makes reference to dice, to the interstate transportation of a juice joint, and to the cashing of gambling checks. Surely defendants knew or should have known what section of the Mississippi statute was allegedly violated. The district court's ruling which denied the motion to dismiss the indictment was correct.

THE DENIAL OF KRESS' MOTION TO SUPPRESS

Kress sought by pre-trial motion and at the trial to suppress vaious items seized at his home and manufacturing plant in Tulsa, Oklahoma on July 21, 1966. He was arrested at 7:30 A.M. on the same date. Identical affidavits had been prepared the same day. These furnished the basis for three warrants to search and seize property at the home, manufacturing plant and in the automobile of Kress. His counsel argues that the search was a general exploratory one in violation of the Fourth and Fifth Amendments, and that probable cause was not demonstrated in the affidavits.

We do not agree. The search was for the instrumentalities involved. It was not general. It was not exploratory. The place to be searched and the items to be seized were as precisely identified in the warrant as the nature of the activity permitted. When circumstances make an exact description of instrumentalities, a virtual impossibility, the searching officer can only be expected to describe the generic class of items he is seeking. *Spinelli v. U.S.* (8th Cir. 1967), 382 F. 2d 871, reversed on other grounds, 37 L.W. 4111 (1969). The fact that the warrant described the articles to be seized as "gambling paraphernalia, including but not limited to dice, crap tables, wires, magnets, coils, solenoid switches, records, sales receipts, customers' lists, shipping orders, supplies, machine equipment, machine tools and hand tools for the manufacture of gambling paraphernalia, including but not limited to dice, crap tables and cards," etc., did not make the description vague and insufficient.

Probable cause was amply demonstrated in the affidavits. The Commissioner, before issuing the search warrants, was given more than sufficient facts from a highly credible source to justify the belief that probable cause existed. The affidavit by an F.B.I. agent identified the informant as a special attorney from the Department of Justice. The Source of the informant's hearsay information was sworn testimony by witnesses before a federal grand jury being conducted by the informant one day before the affidavit was sworn. In addition, the background information contained in the affidavit, based on the affiant's firsthand knowledge and current information, corroborates and

supports the informant's conclusions. The district court properly denied defendant's motion to suppress.

THE MULTIPLE CONSPIRACY ISSUE

The indictment alleges a single conspiracy in a single count. Various overt acts were specified. Appellants argue that the evidence reveals not one conspiracy, but four, and that for this reason a judgment of acquittal on Count One should have been directed. Reliance is placed on *Kotteakos v. United States* (1946), 328 U.S. 750. There, the Supreme Court found that substantial prejudice resulted to a single defendant when he and thirty others and eight separate conspiracies were intertwined under a single general indictment, thus making it impossible to adequately prepare a defense, and confusing the jurors to such an extent that they subconsciously transferred guilt from person to person. Nothing comparable exists here. The Supreme Court has severely limited the applicability of Kotteakos in the case of *Blumenthal v. United States* (1947), 332 U.S. 539. In *Blumenthal,* the indictment charging a conspiracy among two men, who acted as the distributors for liquor owned by a third unknown man, and three others who sold that liquor to a number of tavern owners. The distributors provided cases of the liquor to the salesmen who in turn sold it to the tavern owners at a price on its face below the legal maximum, but the tavern owners surreptiously paid the salesmen an additional illegal amount, part of which was kept by the distributors and part of which was transmitted by them to the hidden owner. The salesmen did not know of the existence of the actual

owner of the liquor they were selling, and each of the three operated individually in their dealings. The Supreme Court found that, although in a hypertechnical sense the evidence might be regarded as showing two agreements, the unique facts revealed a single overall conspiracy of which both agreements were essential and integral steps. In so ruling the court used this pertinent language:

> "Indeed that may be what took place chronologically, for conspiracies involving such elaborate arrangements generally are not born full-grown. Rather they mature by successive stages which are necessary to bring in the essential parties. And not all of those joining in the earlier ones make known their participation to others later coming in.
>
> * * *
>
> "We think that in the special circumstances of this case the two agreements were merely steps in the formation of the larger and ultimately more general conspiracy. In that view it would be a perversion of justice to regard the salesmen's ignorance of the unknown owner's participation as furnishing adequate ground for reversal of their convictions * * * By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their com-

mon single goal." *Blumenthal,* 322 U.S. at 556-558.

Here, as in *Blumenthal,* it is the common goal which provides the continuing theme of the conspiracy. The evidence supports a finding that those present at the beginning as well as those remaining at the end, and those who participated in between, intended to establish a gambling enterprise and to promote that enterprise in a variety of ways through the use of facilities in interstate commerce.

THE MOTION TO DISMISS FOR MISJOINDER OF PARTIES; THE MOTION FOR SEVERANCE

Appellants insist that the district judge erred in failing to grant their motions for severance, both as to the joinder of offenses and to joinder of defendants. Under Rule 8(a) of the Federal Rules of Criminal Procedure, joinder of offenses is ordinarily appropriate where, as here, the offenses arose out of a series of connected acts, and the evidence as to each count, of necessity, overlaps. The contention here in support of an 8(a) severance hinges entirely on the assertion that the proof showed separate conspiracies. The record demonstrates the fallacy of that proposition. Vol. 8, *Moore, Federal Practice,* § 8.05[2], pp. 8-19, 2nd Ed. of 1968; *Johnson v. United States* (8th Cir. 1966), 356 F. 2d 680, 682. Similarly, there was no misjoinder of defendants. Rule 8(b) of the Federal Rules of Criminal Procedure expressly permits joinder if defendants "are alleged to have participated in the same act or transaction or in the same series of acts or

transactions constituting an offense or offenses. A conspiracy count may be joined with the substantive offenses which are its objects. *Chadwick v. United States* (5th Cir. 1941), 117 F. 2d 902, cert. denied 313 U.S. 585, Rule 8(b) specifically states that "all of the defendants need not be charged in each count."

Having found that there was no misjoinder of offenses or defendants under Rule 8, there remains the question of whether defendants were prejudiced so as to require a severance under Rule 14. *Tillman v. United States* (5th Cir. 1969), 406 F. 2d 930. The existence of prejudice, in large part, depends upon the facts of the individual case, *Flores v. United States* (5th Cir. 1967), 379 F. 2d 905, and the granting or rejecting of a motion to sever rests very much in the discretion of the trial judge. *Smith v. United States* (5th Cir., 1967), 385 F. 2d 34, 37. The defendants must prove something more than the fact that "a separate trial might offer a better chance of acquittal." *Tillman v. United States* (5th Cir. 1969), 406 F. 2d 930, 935. The issues in this case were not complex and were clearly presented to the jury. Any prejudice resulting from the joint trial is at best speculative. Accordingly, we hold that a severance under Rule 14 was not required.

DOES BRUTON REQUIRE REVERSAL?

In *Bruton v. United States*, 391 U.S. 123, a confession of a co-defendant who did not take the stand was used against Bruton. The Supreme Court concluded that this constituted a deprivation of his rights under the confrontation clause of the Sixth Amendment. The Gov-

ernment concedes that certain admissions of co-conspirators were admitted into evidence under instructions limiting their application to the declarants. The Government does not concede that the admission of those statements constituted reversible error.

The only statement of a co-conspirator which mentioned appellant Kress directly was that of appellant D'Angelo made to Paul Brown. D'Angelo told him that he sent for Kress to fix the controls on the "juice joint" and paid him for the trip. The evidence linking Kress to the conspiracy and to the substantive offense charged in Count Two was produced by a horde of independent witnesses. Kress installed the wiring for the device and tested it; Kress repaired the device and shipped new parts; he shipped magnetized dice for use with the "juice joint," all of which firmly established him as a member of the conspiracy from its inception; if no proof of his implication with the later stages of the conspiracy had been introduced he would still have been properly convicted.

No statement by co-conspirators referring to Hutchins or Rolling either directly or indirectly were testified to by third parties.

The only statement of a co-conspirator which made reference to D'Angelo was that of Whitmire. No claim under *Bruton* is available, however, because Whitmire took the stand and was thus subject to cross-examination. *Santoro v. United States* (9th Circ. 1968), 402 F. 2d 920; *Rios-Ramirez v. United States* (9th Cir. 1968), 403 F. 2d 1016. The only statement of a co-conspirator

implicating James was made by Orrels to Special Agent Dukes. He admitted that he went to Tulsa and returned to Mississippi with an unidentified companion. The details of his statement would have permitted the jury to infer that the second man was James. James' own statement to Special Agent Toole repeated the details of the trip, and independent testimony established his role in delivering and unloading the "juice joint." The statement of James, testified to by Special Agent Toole, although making no direct reference to the fact that another person accompanied him, was sufficiently linked to other testimony to enable the jury to infer that the trip was the same one in which appellant Orrels participated. Orrels' own statement describing exactly the same events was testified to by Special Agent Dukes. It was corroborated by other independent testimony. Paul Brown testified that D'Angelo had told him that appellant Whitmire was handling the checks at Deano's Lounge. Appellant Whitmire took the stand and admitted her connection with the Marks account, and in light of the independent testimony of the bank president and corroborative documentary evidence, no substantial right of this appellant was prejudiced by that single reference.

Our judgment must be, and is, based on our own reading of this record and on what seems to us to be the overwhelming independent evidence in support of the jury's verdict. Applicable here is the language of the Supreme Court in speaking of the evidence in *Harrington v. California*, 37 L.W. 4472 (June 2, 1969);

"It is so overwhelming that unless we say

no violation of *Bruton* can constitute harmless error, we must leave the state conviction undisturbed."

THE JUDGE'S CHARGE

Appellants press upon the contention that the instructions of the trial court were so erroneous and confusing as to constitute grounds for reversal. We have carefully reviewed the instructions and cannot agree. The judge's charge that "proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs" consistently has been upheld as not being reversible error. *Holland v. United States* (1954), 348 U.S. 121; *United States v. Nuccio* (2nd Cir.), 373 F. 2d 168, cert. denied 387 U.S. 906 (1967); *United States v. Restaino* (3rd Cir. 1966), 369 F. 2d 544; *United States v. Wright* (7th Cir. 1967), 365 F. 2d 135, cert. denied 386 U.S. 918 (1967). It is true that the Supreme Court in *Holland* stated under similar circumstances that it would have been best if this section of the charge had been in terms of the kind of doubt that would make a person hesitate to act rather than the kind on which he would be willing to act. In reviewing the charge on reasonable doubt we look to the whole instruction rather than isolating our attention to one sentence. *Baker v. United States* (5th Cir. 1969), No. 24094, June 20, 1969. When this is done it is seen that the district court properly and completely defined reasonable doubt. None of the other contentions as to the charge warrants more than the statement that each has been considered and found to be without merit.

THE GRAND JURY TESTIMONY

Appellant's next argument is that the trial judge erred in refusing to make available for inspection the grand jury testimony of Robert Bennett and Maurice Arnold. Both were named as co-conspirators. Defense counsel sought this testimony by pretrial motion and timely requested the production of the grand jury statements at the close of the testimony of each witness. In each instance the district judge denied access after an in camera inspection and a finding that there was no material inconsistencies. Defense counsel insist that the court's action is contrary to *Dennis v. United States* (1966), 384 U.S. 855, as interpreted by *United States v. Youngblood* (2nd Cir. 1967), 379 F. 2d 365, and *Allen v. United States* (D.C. Cir. 1968), 390 F. 2d 476. It is true that the appellate court citations urged upon us seem to have formulated a rule to the effect that a showing of "particularized need" as required by *Dennis* is no longer a prerequisite to disclosure of a witness's grand jury testimony after he has testified at trial, but this court has made it clear that the test of particularized need must be met before the secrecy of the grand jury may be breached. *Nolan v. United States* (5th Cir., 1968), 395 F. 2d 383; *Stassie v. United States* (5th Cir. 1968), 401 F. 2d 259; *White and Metz v. United States* (5th Cir., June 18, 1969).[1] Appellants' request was made without showing that the testimony was material to their defense,

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[1]Literally Rule 16(b) allows discovery on a specified showing, but on the principle that the specific controls over the general, it would seem that a motion to inspect grand jury testimony should be under Rule 6(3) rather than 16(b). (See Fed. Practice and Procedure, Wright 1969 Ed. pg. 180).

and therefore is distinguishable from *United States* v. *Hughes* (5th Cir., June 2, 1969). Besides, as to each of these witnesses, defense counsel had available Jenks Act material and made the fullest use of it with extensive cross-examination. The trial judge here complied to the fullest extent with the practice specially approved by this Court in *Mendez v. United States* (5th Cir., 1968), 393 F. 2d 312.

THE DICE TABLE

A table seized at the plant of Jack Kress contained an electric coil embedded between the boards of the table surface. This was not the identical type of electric coil embedded in the floor of the Red Carpet Club. It was never marked as an exhibit but was used as a visual aid for illustration during the testimony of two government witnesses. Appellants rely on *United States v. Adams* (2nd Cir. 1967), 385 F.2d 548, to support their argument that it was error to permit the jury to see this table with a juice joint which was not introduced in evidence. *Adams* held it error to send to the jury room an envelope containing incriminating writings made by narcotics agents while making purchase of cocaine which had not been received in evidence. Three obvious facts distinguish *Adams*: (1) The exhibit was in writing and was hearsay which would have been inadmissible if offered in evidence, unlike the instant case wherein the dice table was merely demonstrative evidence to illustrate the testimony; (2) The envelope's contents were never mentioned during the trial but were seen by the jury for the first time during their deliberations; (3) appropriate objections

were made at the time. In the instant case no objections, except as to relevancy, were made at the time the table was brought into the courtroom or during the relevant testimony. The testimony, by itself, was admissible, and permitting the jury to see a dice table during testimony describing it surely would not constitute reversible error.

PROSECUTOR NEFF BEFORE THE GRAND JURY

The assertion that the prosecution improperly influenced the Grand Jury is premised on the fact that Prosecutor Neff, in the presence of a grand jury, advised appellant Rolling, who had been subpoenaed as a witness, that his conduct was the equivalent of robbery, except that he used an electromagnet rather than a gun. Granting that the remark exceeded standards of propriety, the prejudice claimed by appellants just cannot be substantiated when it is realized that the indictment returned by the grand jury before whom the remark was made was not the indictment on which appellants were tried. A different grand jury returned the indictment at issue here. It knew of the prior true bill, but knew nothing of the description of Rolling as a "robber."

Appellants also argue that the "due administration of justice" was impeded by a one-paragraph press release by Mr. J. Edgar Hoover, which essentially repeated only what was contained in the indictment. This press release was issued 18 months before trial. Continuing their general theme that the government sought to convict by means "fair or foul," appellants

assert that the prosecutor deliberately went beyond strict rebuttal and made an argument that covered the whole case. Appellants point to no specific elements of the government's rebuttal which they claim were prejudicial. The trial judge found the argument to be fair and responsive. In reviewing the transcript, we do not find the argument of the prosecutor to be of such a nature as to warrant reversal.

Other points urged by appellants have been considered but do not warrant discussion.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 26162

D.C. Docket No. 8718–Criminal

DONALD LESTER JAMES, IVAN ORRELS, DEWEY D'ANGELO, ALICE DIANNE WHITMIRE, RAYMOND LEROY ROLLING, JACK EDWARD KRESS, and HARVEY HUTTON HUTCHINS, *Appellants,*

v.

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Southern District of Mississippi.

Before BROWN, Chief Judge, DYER, Circuit Judge, and HUNTER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said

District Court in this cause be, and the same is hereby, affirmed.

September 17, 1969

Issued as Mandate: